BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT E. RUPERT Claimant	)	
VS.	)	
LADY BALTIMORE FOODS, INC. Respondent	)	Docket Nos. 1,005,992 & 1,005,993
AND	)	
HARVEST INSURANCE CO. Insurance Carrier	)	

ORDER

Claimant requested review of the September 29, 2006 Award by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on December 20, 2006.

APPEARANCES

James E. Martin of Overland Park, Kansas, appeared for the claimant. Jennifer L. Arnett of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Two claims were consolidated for hearing. In Docket No. 1,005,992, the claimant sought benefits for bilateral carpal tunnel injuries which respondent admitted were compensable work-related injuries. In Docket No. 1,005,993, the claimant sought benefits for bilateral knee injuries. Respondent agreed claimant suffered a work-related injury to his right knee but denied claimant suffered injury to his left knee.

The Administrative Law Judge (ALJ) used the upper and lower extremity ratings from both docketed claims and combined them for a 35 percent whole person functional

impairment. The ALJ then entered a single award based upon that percentage of impairment.

The claimant requested review of the following: (1) whether the ALJ erred in combining the impairments for both dockets; (2) nature and extent of disability in both dockets; (3) whether the ALJ erred in not finding an underpayment of temporary total disability in Docket No. 1,005,993; and, (4) whether the ALJ erred in not awarding unauthorized medical expenses incurred with Dr. Ketchum in Docket No. 1,005,992 and Dr. Edward Prostic in Docket No. 1,005,993.

Claimant argued he was entitled to the maximum $100,000 work disability award in the first claim. Claimant further argued that as a result of the second injury he is permanently and totally disabled.

Respondent raised issues regarding whether or not the claimant is entitled to a work disability in both cases as well as whether the claimant sustained an injury to his left knee arising out of and in the course of employment with the respondent.

Respondent argued the claimant is entitled to a 6 percent functional impairment to the body as a whole for his bilateral upper extremities since claimant was released to return to work without restrictions. Respondent further argued the claimant is only entitled to a 5 percent functional impairment to the right knee because no restrictions were imposed for that lower extremity injury.

After oral arguments were made to the Board but before the Board entered a decision, the Kansas Supreme Court rendered its *Casco*[1] decision. Because that decision potentially impacted the nature and extent of claimant's disability in both dockets the parties were afforded the opportunity for rehearing. The claimant requested that the Board delay a decision until the Supreme Court's decision became final. On May 8, 2007, the Supreme Court denied the motion for rehearing in *Casco* and the parties were given additional time to submit briefs on the impact the *Casco* decision might have on the pending case.

Claimant now argues that because of his bilateral upper extremity injuries he is permanently and totally disabled. And claimant reiterates his initial argument that as a result of his bilateral knee injuries he is realistically unemployable and entitled to an award of permanent total disability. Claimant further argues that the AMA *Guides*[2] require that

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[1] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

multiple injured body parts be rated as a whole body impairment. Consequently, it is argued that because claimant suffered multiple injuries he should receive a whole person functional impairment which then would allow a work disability.

Conversely, respondent argues claimant is only entitled to two separate scheduled disability awards for his upper extremity injuries because the doctor's restrictions would not prevent a return to the open labor market and the respondent's vocational expert testified claimant retained the ability to return to substantial and gainful employment. Initially, the respondent argued claimant only injured his right knee but argued in the alternative that if it is determined claimant suffered bilateral knee injuries the doctor's restrictions would not prevent claimant from returning to the open labor market and respondent's vocational expert testified claimant retained the ability to earn a wage which would constitute substantial gainful employment. Finally, respondent notes that the percentage of functional impairment is determined pursuant to the AMA *Guides*, but the determination of whether claimant suffered a scheduled or whole person impairment is controlled by the facts and in this case the claimant at best suffered bilateral upper extremity injuries and bilateral lower extremity injuries which are compensated as either scheduled injuries or an award of permanent total disability. *Casco* eliminated the possibility of an award of compensation under K.S.A. 44-510e.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant dropped out of high school in the tenth grade but later obtained his GED in 1980. Claimant went to work for respondent in 1970. Claimant was employed as a warehouseman and began to experience tingling, numbness, pain and loss of grip strength in his hands.[3] But when his hands started changing color to blue or black claimant reported his problems to respondent and on January 28, 2002, he was provided medical treatment with Dr. Brad W. Storm.

Dr. Storm recommended claimant have bilateral carpal tunnel release surgery. Claimant continued performing his regular job duties in the interim before the first surgery was scheduled. On February 8, 2002, claimant was operating a high lift and as he was getting off his right foot caught on a pedal and he fell onto his knees.[4] Claimant landed on and hurt both knees but the right knee was more painful because he felt a tear in that knee

[3] Docket No. 1,005,992.

[4] Docket No. 1,005,993.

as he twisted and fell. Respondent referred claimant to Employee Health Services for treatment.

On February 27, 2002, Dr. Storm performed a left open carpal tunnel release surgery on claimant. On March 27, 2002, Dr. Storm performed a right open carpal tunnel release surgery on claimant. Claimant performed light-duty work between the two hand surgeries. Surgery did not improve claimant's hands and he noticed that he started getting hand tremors in both hands but worse in his dominant left hand. Because of his continued hand problems claimant was referred to Dr. Carabetta and later to Dr. Lanny W. Harris.

On April 3, 2002, Dr. Roger W. Hood performed arthroscopic surgery on claimant's right knee. The procedure consisted of resection of the posterior horn medial meniscus and cartilage shave of the patella. When claimant returned to work following his knee surgery he was simply required to clock in and clock out. He spent his time at work sitting and talking to other employees.

The claimant noted that his left knee continued to hurt especially when he bent it and he couldn't walk for long without it hurting. Claimant testified that he also complained to Dr. Hood about his left knee hurting while he was receiving treatment for his right knee. And claimant noted that his left knee became more painful because he was favoring the right knee when he walked. On August 21, 2002, Dr. Hood performed surgery on claimant's left knee. The arthroscopic surgical procedure consisted of a cartilage shave of the patella and medial femoral condyle and partial medial and lateral meniscectomies.

Claimant again returned to work but was again just required to clock in and after eight hours clock out. He was not required to do anything and believed he was treated in that fashion because he was a long-term employee. The respondent went bankrupt, closed and claimant's last day worked was January 1, 2003.

Claimant has continued difficulty using his hands for fine manipulation as well as grip strength. If he uses his hands performing repetitive tasks his hands start tingling and hurting. He continues to have hand tremors worsened with use.

Claimant denied any problems with his knees until the accident on February 8, 2002. Claimant has continued problems with his knees and sometimes uses a cane to walk because the right leg gives out causing him to fall. Claimant can only walk approximately 100 yards before he feels that his legs become weak.

DOCKET NO. 1,005,992

It was undisputed claimant suffered bilateral carpal tunnel syndrome as a result of his repetitive work activities for respondent with an agreed accident date of January 11, 2002. The claimant was referred to Dr. Brad W. Storm for treatment of his hand

complaints. Dr. Storm first examined claimant on January 28, 2002, and diagnosed him with bilateral carpal tunnel syndrome. On February 27, 2002, Dr. Storm performed a left open carpal tunnel release surgery on claimant. On March 27, 2002, Dr. Storm performed a right open carpal tunnel release surgery on claimant. On July 15, 2002, Dr. Storm met with claimant and offered him the option of a follow-up exam in a few months or a rating. Claimant indicated he would prefer being released and Dr. Storm rated him at 5 percent for each hand which combined for a 6 percent whole person functional impairment based upon the AMA *Guides*. Dr. Storm released claimant without any permanent restrictions. Consequently, when Dr. Storm reviewed the list of claimant's former work tasks prepared by Ms. Titterington he concluded claimant did not suffer any task loss due to his carpal tunnel syndrome.

When later questioned, at his deposition some four years after he last saw claimant, about claimant's ongoing complaints and Dr. Ketchum's examination findings, Dr. Storm opined that those findings were not related to claimant's carpal tunnel syndrome. Moreover, Dr. Storm opined that claimant's hand tremor problems were likewise unrelated to his carpal tunnel syndrome.

On cross-examination Dr. Storm noted that he used the testing performed by the physical therapists in arriving at his impairment ratings. And those test findings correlated to a 32 percent whole person functional impairment under the AMA *Guides*. The doctor further agreed that preoperatively claimant had moderate carpal tunnel syndrome which the AMA *Guides* would rate at 20 percent to each hand which would combine for a 23 percent whole person functional impairment. Moreover, Dr. Storm agreed it would have been helpful to re-examine claimant in order to give an opinion regarding his condition some four years after he had last seen claimant. And lastly, Dr. Storm conceded that if claimant had recurrent or persistent carpal tunnel syndrome, then he would place permanent restrictions on claimant.

Dr. Lynn D. Ketchum saw claimant on October 28, 2002, and September 3, 2003, at the request of claimant's attorney. The purpose of the first visit and examination of claimant was to diagnose his condition and make treatment recommendations. Dr. Ketchum noted that claimant's bilateral carpal tunnel surgeries did not improve the function or sensation in his hands. Dr. Ketchum diagnosed claimant with opponens palsy in the left thumb with atrophy and his grip strength was very weak. The doctor performed nerve conduction studies that demonstrated some improvement from previous studies. Dr. Ketchum diagnosed claimant with persistent but somewhat improved carpal tunnel syndrome bilaterally with opponens palsy on the left. The doctor recommended rechecking claimant in four to six months and if his condition did not improve then he would recommend a surgical opponens tendons transfer on the left hand.

Dr. Ketchum examined claimant again on September 3, 2003. Although claimant's grip strength had slightly improved, nonetheless, claimant still had moderately severe left

carpal tunnel syndrome and mild right carpal tunnel syndrome. Using the AMA *Guides*, Dr. Ketchum rated claimant with a 10 percent impairment to the right upper extremity and a 30 percent impairment to the left upper extremity which combine for a 23 percent whole person functional impairment. The doctor imposed permanent restrictions of no lifting over 25 pounds and no repetitive gripping more than 40 percent of the time.

Dr. Ketchum reviewed the list of claimant's former work tasks prepared by Ms. Titterington and concluded claimant could no longer perform 4 of the 6 tasks for a 67 percent task loss. Dr. Ketchum reviewed the list of claimant's former work tasks prepared by Mr. Dreiling and concluded claimant could no longer perform 7 of the 8 tasks for an 88 percent task loss.

Michael Dreiling, a vocational consultant, conducted a personal interview with claimant on August 14, 2003, at the request of claimant's attorney. He prepared a task list of 8 non-duplicative tasks claimant performed in the 15-year period before his injury. Mr. Dreiling opined that claimant's bilateral upper extremity injuries did not preclude claimant from returning to work. But it would be unskilled entry level work or a limited job market. Utilizing Dr. Ketchum's restrictions Mr. Dreiling opined claimant would find entry level work from minimum wage up to $8 an hour or between $206 and $320 a week.

Mary Titterington, a vocational rehabilitation counselor, conducted a personal interview with claimant on June 6, 2006, at the request of respondent's attorney. She prepared a task list of 6 non-duplicative tasks claimant performed in the 15-year period before his injury. Ms. Titterington opined that claimant's bilateral upper extremity injuries did not preclude claimant from returning to work. Ms. Titterington utilized Dr. Ketchum's restrictions to conclude claimant could perform sedentary work such as a front desk clerk, or security guard. She further opined claimant had the ability to earn from $10.50 to $13.50 an hour or between $420 and $540 a week.

Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the AMA *Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.[5] The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[6] It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability.

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[5] K.S.A. 44-510e(a).

[6] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

Both Drs. Storm and Ketchum agreed that claimant suffered a permanent impairment as a result of his bilateral carpal tunnel injuries.

In *Casco*, the Kansas Supreme Court considered whether an individual who sustained bilateral, parallel, non-simultaneous injuries to his shoulders was entitled to compensation based upon two separate scheduled injuries, under K.S.A. 44-510d, or as a unscheduled whole body injury, under K.S.A. 44-510e(a). After examining the applicable statutes and the relevant case law, the *Casco* Court departed from the well-recognized and long-established case law going back over 75 years. In doing so, it provided certain rules. They are as follows:

> Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.
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> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.
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> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with the K.S.A. 44-510d.
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> K.S.A. 44-510e permanent partial general disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.[7]

Previously, bilateral injuries were considered as being outside the statutory schedule of impairments set forth in K.S.A. 44-510d and were treated as a permanent partial general impairment.[8] Now, post-*Casco*, the analysis changes somewhat. Apparently, in any combination scheduled injuries are now the rule, while nonscheduled injuries are the

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[7] *Id.*, Syl. ¶'s 7-10.

[8] *Honn v. Elliott*, 132 Kan. 454, 295 Pac. 719 (1931).

exception.[9] When an employee's injury involves both arms, as here, there is a rebuttable presumption that the claimant is permanently and totally disabled. That presumption can be rebutted by evidence that the claimant is capable of engaging in some type of substantial gainful employment.[10]

When this case was tried the claimant did not contend that claimant's parallel upper extremity injuries caused a permanent total disability and instead requested the claimant receive a work disability. Because of *Casco*, the Board must modify the Award as the Judge computed claimant's permanent disability benefits under K.S.A. 44-510e. Moreover, under *Casco*, claimant either receives benefits for a permanent total disability under K.S.A. 44-510c or permanent partial disability benefits under K.S.A. 44-510d.

Claimant performed light-duty work after his first carpal tunnel release surgery and by the time he had his second carpal tunnel surgery he had also suffered knee injuries and was simply never able to return to his regular employment. Nonetheless, he clocked in for eight hours and was paid his pre-injury average weekly wage until January 1, 2003, when respondent closed its business activities. Although Dr. Storm did not impose restrictions, he did agree that he would impose restrictions if claimant's carpal tunnel syndrome persisted. Dr. Ketchum's later diagnostic testing revealed persistent bilateral carpal tunnel syndrome as demonstrated by claimant's continued complaints of hand pain as well as numbness, tremors and palsy on the left. The Board concludes that Dr. Ketchum's restrictions were appropriate and those restrictions would have prevented claimant from returning to his regular job duties with respondent. But after respondent closed its operations claimant failed to make a good faith job search effort.

Both vocational experts offered opinions regarding the claimant's wage earning ability and neither the vocational experts nor the doctors concluded claimant could not return to substantial and gainful employment because of his bilateral upper extremity injuries. Claimant has sustained two separate bilateral upper extremity injuries. Claimant is presumptively permanently and totally disabled. However, that presumption is rebutted by the fact that both vocational experts testified regarding the wage earning ability the claimant retains which the Board finds constitutes substantial gainful employment. Moreover neither doctor restricted claimant's activities to a degree that substantial gainful employment would be prevented. Consequently, claimant's recovery is limited and he is not entitled to permanent total disability benefits under K.S.A. 44-510c(a)(2) but is entitled to compensation for two scheduled injuries.

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[9] *Casco*, 283 Kan. 508, Syl. ¶ 7; *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

[10] *Id.*, Syl. ¶ 9.

Both Drs. Storm and Ketchum expressed opinions on claimant's permanent functional impairment rating utilizing the AMA *Guides*. Dr. Storm rated claimant at 5 percent for each hand which combined for a 6 percent whole person functional impairment. Dr. Ketchum rated claimant with a 10 percent impairment to the right upper extremity and a 30 percent impairment to the left upper extremity which combine for a 23 percent whole person functional impairment. On cross-examination Dr. Storm agreed that he used the testing performed by the physical therapists to arrive at his impairment ratings. And he further noted that simply extrapolating those findings to the AMA *Guides* would result in a 32 percent whole person functional impairment. The doctor further agreed that preoperatively claimant had moderate carpal tunnel syndrome which the AMA *Guides* would rate at 20 percent to each hand which would combine for a 23 percent whole person functional impairment. Finally, Dr. Storm agreed that it would have been helpful to reexamine claimant since he was providing deposition testimony some four years after he had last seen the claimant.

After considering both opinions the Board finds Dr. Ketchum's rating more accurately reflects claimant's impairment and more appropriately conforms with claimant's ongoing complaints. Consequently, the Award is modified to reflect a 10 percent permanent partial impairment to the right upper extremity at the level of the forearm and a 30 percent permanent partial impairment to the left upper extremity at the level of the forearm.[11]

Here, claimant sustained simultaneous bilateral and parallel injuries to his upper extremities. Both of those extremities are listed in K.S.A. 44-510d. And there is no evidence that as a result of his upper extremity injuries he is permanently and totally disabled. Thus, under the *Casco* analysis, claimant is entitled to recovery based upon *two separate scheduled injuries*. Accordingly, the ALJ's Award is hereby modified to reflect two separate scheduled injuries at the level of the forearms rather than a whole body impairment as a result of claimant's work-related accident.

The claimant requested unauthorized medical compensation for an examination of claimant conducted by Dr. Ketchum. The Workers Compensation Act allows a worker to consult a doctor of the worker's choice for the purpose of diagnosis, evaluation, and treatment. K.S.A. 44-510h(b)(2) provides:

> Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of $500. The amount allowed for such examination,

[11] K.A.R. 51-7-8 (c)(4) provides that an injury at the joint on a scheduled member shall be a loss to the next higher schedule. As the claimant's bilateral carpal tunnel injuries involve the wrist joint his compensation shall be calculated pursuant to K.S.A. 44-510d(a)(12) using 200 weeks.

> diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

Dr. Ketchum saw claimant on October 28, 2002, took a history from the claimant, reviewed previous medical treatment records, performed nerve conduction studies and conducted a physical examination of claimant. The doctor made treatment recommendations and no functional impairment rating was contained in the doctor's report.

The Board concludes claimant's October 28, 2002 visit with Dr. Ketchum qualifies as unauthorized medical treatment as contemplated by the Workers Compensation Act. Accordingly, claimant is entitled to be reimbursed the $500 statutory maximum for such unauthorized medical.[12]

DOCKET NO. 1,005,993

The respondent did not deny that claimant suffered a work-related injury to his right knee in the fall at work on February 8, 2002. But respondent denied that claimant's later left knee problems were work related.

The respondent referred claimant to Dr. Roger W. Hood for treatment of claimant's right knee. The doctor first examined claimant on March 28, 2002. Claimant gave a history that his foot had caught and he suffered a twisting injury to his right knee. Claimant had already had an MRI which revealed a horizontal cleavage tear of his medial meniscus. On April 3, 2002, Dr. Hood performed arthroscopic surgery on claimant's right knee. The procedure consisted of resection of the posterior horn medial meniscus and cartilage shave of the patella. On April 18, 2002, the doctor started claimant on some exercises and indicated claimant could return to operating a stand-up forklift but the doctor did not want claimant to squat, kneel or crawl. At a follow-up appointment on July 9, 2002, the doctor continued the temporary restrictions. At that examination the claimant complained that his left knee was catching which the doctor thought sounded like a torn cartilage. The doctor could not recall whether claimant had made left knee complaints before this date.

The doctor had noted claimant had an antalgic gait on the right and noted the claimant overloaded his left knee as he was recovering from the right. The doctor ordered an MRI of the left knee which revealed a tear of the posterior horn medial meniscus of the left knee. On August 21, 2002, Dr. Hood performed surgery on claimant's left knee. The arthroscopic surgical procedure consisted of a cartilage shave of the patella and medial femoral condyle and partial medial and lateral meniscectomies. At a follow-up examination of claimant on September 5, 2002, the doctor noted that the left knee looked like it was

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[12] Ketchum Depo., Ex. 3.

degenerative findings and not traumatic or work-related. Dr. Hood thought the type of tear claimant had in his knees was more a degenerative tear than a traumatic type tear. And the doctor thought claimant was down to bone on bone in the left knee when the surgery was performed.

Dr. Hood did not impose any permanent restrictions for claimant's right knee. At the last time Dr. Hood saw claimant on October 17, 2002, claimant still was having some pain and discomfort in his left knee which the doctor attributed to the fact claimant was bone on bone in that knee. Dr. Hood rated claimant with a 5 percent impairment to each knee based upon the AMA *Guides*. The doctor considered claimant's left knee complaints were primarily an aggravation of that knee while claimant was overloading it while protecting his other side. The doctor did not impose any restrictions for claimant's left knee. Consequently when Dr. Hood reviewed the list of claimant's former work tasks prepared by Ms. Titterington he concluded claimant did not suffer any task loss due to his knee injuries.

Dr. Hood adamantly disagreed that claimant could have been asymptomatic with the degree of degeneration revealed in his knees at the time of the surgeries. The doctor concluded claimant was not telling the truth about being asymptomatic even though he found claimant to be otherwise credible.

Dr. Edward J. Prostic saw claimant on November 27, 2002, and September 29, 2003, at the request of claimant's attorney. The purpose of the first visit and examination of claimant was to evaluate claimant's condition. The doctor stated that claimant's meniscus injuries in each knee and aggravation of his underlying osteoarthritis was caused by his fall at work. The doctor noted claimant continued to have bilateral knee symptoms and recommended claimant continue on the medications and exercises prescribed by Dr. Hood.

Dr. Prostic examined claimant again on September 29, 2003. Claimant continued to have knee problems with the right knee giving way and he had an antalgic gait using a cane to walk. X-rays were obtained and showed reduced joint space in the medial compartment of each knee when compared to the films taken in the November 27, 2002 office visit. The doctor diagnosed claimant with ongoing osteoarthritis in response to the injuries suffered to his knees in his fall at work for respondent. Using the AMA *Guides*, Dr. Prostic rated claimant with a 20 percent impairment to each lower extremity. Finally, the doctor opined that claimant will require bilateral total knee replacement surgery as a result of the injuries he suffered.

Dr. Prostic imposed permanent restrictions that claimant should not be asked to stand and/or walk more than 30 minutes per hour, that he should minimize climbing, squatting, kneeling, crawling and should not be doing heavy lifting or carrying. Dr. Prostic

reviewed the list of claimant's former work tasks prepared by Mr. Dreiling and concluded claimant could no longer perform 4 of the 8 tasks for a 50 percent task loss.

Mr. Dreiling opined that claimant's knee injuries and Dr. Prostic's restrictions attributable to those injuries would preclude claimant from returning to work. Mr. Dreiling thought that requiring claimant to be sedentary in a sit-down job realistically would take claimant out of the job market. Mr. Dreiling noted that sedentary positions are generally clerical or computer based and claimant's experience working in a warehouse for 34 years coupled with a GED education would prevent claimant from finding a sedentary job in the open labor market that he was qualified to perform.

Ms. Titterington opined that claimant's knee injuries and the restrictions attributable to those injuries did not preclude claimant from returning to work. She thought claimant capable of working as a forklift driver, inspector, assembler or sub-assembler, night desk clerk and security guard if he just had to sit at an entrance gate. She opined claimant retained the ability to earn from $10.50 to $13 an hour or between $420 and $520 a week based upon the restrictions for his knee injuries.

When Ms. Titterington considered both the upper and lower extremity injuries she still opined claimant could perform light work. On cross-examination Ms. Titterington conceded that because of claimant's age and walking with a cane his job market would be limited.

Initially, respondent contends that claimant only suffered permanent injury to his right knee and his compensation for the February 8, 2002, fall at work should be limited to a scheduled disability. Respondent argues that claimant's left knee symptoms were unrelated to the fall. The Board disagrees.

Respondent relies upon a letter from Dr. Hood dated September 5, 2002, which indicated that when he performed surgery on claimant's left knee he thought the findings were more degenerative than traumatic or work-related.[13] But in a letter dated October 17, 2002, Dr. Hood rated claimant's left knee as a result of his condition being aggravated by being overloaded while protecting the right knee.[14] Dr. Hood later testified that it was his opinion to a reasonable degree of medical certainty that claimant's left knee was aggravated by overuse while protecting his right knee and that was why he provided a rating for the left knee.[15] It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing

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[13] Hood Depo., Ex. 2.

[14] *Id*., Ex. 2.

[15] *Id*. at 14, 33.

disease or intensifies the affliction.[16] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[17] Moreover, Dr. Prostic testified that claimant's injuries to his knees were the result of his work-related accident. The Board finds claimant has met his burden of proof that he suffered bilateral knee injuries arising out of and in the course of his employment with respondent.

Claimant sustained bilateral, parallel simultaneous injuries to his lower extremities. Both of those extremities are listed in K.S.A. 44-510d. Under *Casco*, claimant either receives benefits for a permanent total disability or permanent disability benefits under K.S.A. 44-510d. Claimant argues that as a consequence of his bilateral parallel knee injuries he is permanently and totally disabled. The Board disagrees.

Mr. Dreiling opined that the restrictions for his knees rendered claimant realistically unemployable. However, neither Dr. Hood nor Dr. Prostic concluded claimant was realistically unemployable. Dr. Hood did not think claimant was prevented from returning to work and Dr. Prostic offered a task loss opinion which indicated claimant retained the ability, at a minimum, to perform sedentary full-time employment. Ms. Titterington concluded that although the number was limited, there were jobs within the restrictions imposed by Dr. Prostic that claimant could perform. The Board finds claimant failed to meet his burden of proof that he is permanently and totally disabled.

Dr. Hood rated claimant with a 5 percent impairment to each knee based upon the AMA *Guides*. Using the AMA *Guides,* Dr. Prostic rated claimant with a 20 percent impairment to each lower extremity. Although Dr. Hood never imposed restrictions the claimant continued to have pain in his knees and problems with his right knee giving out which led to claimant's use of a cane while walking. Dr. Hood noted he was not surprised that claimant was having ongoing knee pain, especially on the right, as a portion of that knee was bone on bone. Given claimant's continued knee problems the Board finds Dr. Prostic's ratings more persuasive in this case The Board finds that as a result of his right knee injury the claimant has suffered a 20 percent impairment and as a result of his left knee injury the claimant has suffered a 20 percent impairment.

The claimant requested unauthorized medical compensation for an examination of claimant conducted by Dr. Prostic. As previously noted, the Workers Compensation Act allows a worker to consult a doctor of the worker's choice for the purpose of diagnosis,

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[16] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[17] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

evaluation, and treatment.[18] Dr. Prostic saw claimant on November 27, 2002, took a history from the claimant, reviewed previous medical treatment records, obtained x-rays and conducted a physical examination of claimant. The doctor made treatment recommendations and no functional impairment rating was contained in the doctor's report.

The Board concludes claimant's November 27, 2002 visit with Dr. Prostic qualifies as unauthorized medical treatment as contemplated by the Workers Compensation Act. Accordingly, claimant is entitled to be reimbursed the $500 statutory maximum for such unauthorized medical.[19]

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

AWARD IN DOCKET NO. 1,005,992

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated September 29, 2006, is modified for two upper extremity injuries as follows:

Left Forearm

The claimant is entitled to 20 weeks of permanent partial disability compensation, at the rate of $417 per week, in the amount of $8,340 for a 10 percent loss of use of the left forearm, making a total award of $8,340.

Right Forearm

The claimant is entitled to 60 weeks of permanent partial disability compensation, at the rate of $417 per week, in the amount of $25,020 for a 30 percent loss of use of the right forearm, making a total award of $25,020.

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[18] See K.S.A. 44-510h(b)(2).

[19] Prostic Depo., Ex. 4.

AWARD IN DOCKET NO. 1,005,993

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated September 29, 2006, is modified for two lower extremity injuries as follows:

Left Leg

The claimant is entitled to 6.43 weeks of temporary total disability compensation at the rate of $417 per week in the amount of $2,681.31 followed by 38.71 weeks of permanent partial disability compensation, at the rate of $417 per week, in the amount of $16,142.07 for a 20 percent loss of use of the left leg, making a total award of $18,823.38.

Right Leg

The claimant is entitled to 6.43 weeks of temporary total disability compensation at the rate of $417.00 per week in the amount of $2,681.31 followed by 38.71 weeks of permanent partial disability compensation, at the rate of $417.00 per week, in the amount of $16,142.07 for a 20 percent loss of use of the right leg, making a total award of $18,823.38.

IT IS SO ORDERED.

Dated this 31st day of July 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Jennifer L. Arnett, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge